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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

Motion to Affirm

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Appellees Public Utilities Commission of California and the People of the State of California move to affirm on the grounds that the appeal and the questions presented therein are so unsubstantial as not to need further argument.

I.

JURISDICTION AND AUTHORITY OF THE INTERSTATE COMMERCE COMMISSION IN ABANDONMENT PROCEEDINGS

Section 1(18) of the Interstate Commerce Act provides that no portion of a line of railroad[1] shall be abandoned

1. For easy reference there is attached as an appendix a map

unless there is first obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity permit such action. Subsequent to the enactment of this section in the Transportation Act of 1920 the United States Supreme Court, in *Colorado v. United States*, 271 U.S. 153, 70 L.ed. 878 (1925), first passed upon the constitutionality of the section and enunciated the basis for the extension of federal jurisdiction to an area, theretofore within the purview of the states. That opinion has retained its validity, is still quoted as the leading authority on the subject and is, in fact, cited and quoted in the Interstate Commerce Commission opinion complained of here. (Appendix B to Jurisdictional Statement, p. 17a.)

It is evident from the *Colorado* case that the view of this Court was that the objective of Sections 1(18-20) is the protection of interstate commerce from *undue burdens* and not the protection of the railroad. (*Colorado v. United States*, *supra*, at page 162.) As noted further at page 163, the sole criterion prescribed in the statute is that abandonment be consistent with public convenience and necessity. This test of "undue burden" was adopted by the Interstate Commerce Commission and utilized over the years in abandonment proceedings. (See e.g., *New York Central Railroad Company Abandonment*, F.D. 13914, 254 ICC 745, 763 (1944)). Congress itself then, in the Transportation Act of 1958, affirmed the continuing validity of the test of undue burden on interstate commerce by incorporating that precise language in Sections 13a(1) and (2) of the Interstate Commerce Act in addition to the usual test of public convenience and necessity.[2]

2. Sections 13a(1) and (2) give the Interstate Commerce Commission jurisdiction for the first time to authorize discontinuance

As implemented by the Interstate Commerce Commission and interpreted by the courts, it is apparent that although an express finding of whether a burden exists upon interstate commerce is not expressly required by Section 1(18), it is nevertheless implicit in the determination of the statutory criterion of what is consistent with the public convenience and necessity. (*Colorado v. United States, supra; Transit Commission v. United States*, 284 U.S. 360, 367, 76 L.ed. 342 (1932).) Pursuant to this approach the Interstate Commerce Commission has consistently arrived at its determination of public convenience and necessity by weighing the public need for the continuation of the service on the one hand against the existence and degree of the burden upon interstate commerce on the other hand. (*New York Central Railroad Company Abandonment*, F.D. 13914, 254 ICC 745, 763 (1944).)

California submits that evidence that there is an undue burden upon the carrier—and consequently upon interstate commerce—to be eliminated by abandonment is a necessary part of any showing in an abandonment proceeding and that lacking such evidence the certificate authorizing abandonment cannot issue.[3] As will be shown below, no finding of unprofitable operation and resulting undue burden could possibly have been made on this record. Appellant made no

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of a *particular train* on a line of railroad as opposed to the discontinuance of *all* service and abandonment of the line. (*Southern Ry. Co. v. North Carolina*, 376 U.S. 93, 11 L.ed. 2d 541, 547 (1964).)

3. The only apparent exception is the group of cases where the abandonment was dictated by an overriding public need occasioned by flood control, civic projects, highway construction, etc. (See e.g., *Confluence & O.R. Co., Abandonment*, 244 ICC 451 (1942) and 247 ICC 399 (1941); *Purcell v. United States*, 315 U.S. 381 (1942); *Oakland Terminal Railway, Abandonment*, F.D. 20235, not printed (1959); *Feather River Railway Co., Abandonment*, F.D. 22060, ... ICC ... (1964).)

pretense that such was the case and, in fact, freely conceded in its evidence that the Northwestern Pacific, as a separate entity, would actually be in a more advantageous position financially if the tunnel were rebuilt.

II.

THERE IS NO BURDEN UPON INTERSTATE COMMERCE TO BE ELIMINATED BY GRANTING THE CERTIFICATE TO ABANDON

Evidence introduced by Appellant showed on its face that there was no loss to Appellant to be reduced or eliminated by the abandonment, but that, in fact, Appellant's profits would be substantially reduced rather than improved. This may be ascertained by reference to Appellant's Exhibit No. 4, page 4, bottom line, in which it is established that in the test years 1959 and 1960 and the first five months of 1961 (up to the date of the fire) the Appellant earned respectively $156,819, $101,656 and $38,478 in net profits which could not have been earned had the tunnel not then been in operation. (pps. 17a and 18a of Appendix to Jurisdictional Statement. See generally Exh. No. 56, pp. 1-1 through 1-4.) For 1960, the last full year of operation through the tunnel, Appellant enjoyed net profits 37% higher than it would have realized had the tunnel been closed. Appellant's proposal is, therefore, destructive and self-defeating and would not conceivably be made if Appellant were an independent corporate entity acting in its own best interest. The Appellant is in the position of establishing by its showing that, as to the Northwestern Pacific entity, unprofitable operations and burdens upon interstate commerce are more likely to be created rather than alleviated if its abandonment plan is authorized.

The reason for this unusual proposal is also made clear by Exhibit No. 4, at page 6. Benefits to the parent Southern

Pacific would far exceed any loss to Appellant so that the net effect of the abandonment would be to Southern Pacific's system-wide advantage. Some of the benefit gained by Southern Pacific would be at the expense of its wholly-owned subsidiary, but most would be gained from its competitor, The Atchison, Topeka and Santa Fe Railway Company, by diversion of traffic from the Tiburon gateway to Southern Pacific's Schellville route.[4] None of the above facts are in dispute since they are established by Appellant's own evidence. Despite the clear intent of the statutes and the cases, as set forth in paragraph I above, to base abandonment authorizations upon the proper tests of public convenience and necessity and burden upon interstate commerce resulting from operations conducted at a loss, Appellant has premised its case upon the theory that abandonment of a profitable line of railroad is justified if it can be shown that a parent corporation (not a party to the proceeding) will thereby add to its system profits by diverting traffic from a competitor.

Lacking any issue of burden upon interstate commerce, the only relevant issue which remained was that of the continued public need for the service. Numerous shipper and receiver witnesses testified as to their former dependence upon the direct and frequent rail service before the fire. They complained of the present complete loss of service in the case of some commodities; and the curtailed and inadequate service now existing as to other commodities. Shippers did not consider truck service to be an adequate

4 Appellant's Exhibit No. 4 shows at page 5 increased revenues to Southern Pacific for 1959 of $602,088, assuming the tunnel had been closed in that year. Of this amount $169,544 represents revenue lost by Appellant due to the abandonment. The remainder, $432,544, by admission of Appellant's witness (Tr. 464), represents revenues gained by Southern Pacific at the expense of Santa Fe.

substitute for the prior rail service. Upon evaluation of all the evidence the Commission concluded (p 18a of Appendix to Jurisdictional Statement) that the benefits to Appellant and Southern Pacific would not exceed the adverse effects upon the shipping public; that the area in question could in the forseeable future generate sufficient revenue to justify restoration; and that despite the expenditure to repair the tunnel the Appellant could continue its profitable operations as in the past.

As indicated in the *Colorado* case, *supra*, the public need for the service should be weighed against the burden upon interstate commerce to be removed if the service is eliminated. Here, in exchange for a serious service loss to the shipping public, no benefit to interstate commerce is discernible. It cannot even be claimed that savings and economies will result overall which can be passed on to shippers since, as the decision of the Commission states, based upon Appellant's own figures (p. 18a, Appendix to Jurisdictional Statement), the net effect of the abandonment if all three railroads are considered would be a loss, since the gain to Southern Pacific would be far surpassed by the revenue losses resulting for Santa Fe and for Appellant. Lacking any issue of losses and burden upon interstate commerce the dispute resolves itself to what the Commission decision aptly describes (page 18a of Appendix to Jurisdictional Statement) as:

> ". . . a matter of only the degree of profits by the railroads on the one hand as against a loss by the shipping public through fewer facilities for rail transportation and a less efficient, slower service, ..."

The California Commission will go further and state that this proceeding is nothing but a contest for competitive advantage between two prosperous carriers, Southern Pa-

cific and Santa Fe, with Southern Pacific attempting to take advantage of an unfortunate act of arson by juveniles in order to disturb routes which have existed for many years to the satisfaction of the public and which have been profitable to one degree or another for all participating carriers. We seriously question the jurisdiction of the Interstate Commerce Commission to authorize an abandonment—absent an issue of burden upon interstate commerce—which while curtailing service to the public, offers only a shifting, or realignment of traffic and revenues between prosperous carriers.

At pages 3 and 9 of the Jurisdictional Statemen mention is made of the debt of $48,000,000 owed by Appellant to the parent Southern Pacific. This fact is unfortunate, but it is no justification for an abandonment which will severely cut into Appellant's profits. The record shows (Exhibit A to Return To Questionnaire) that Appellant has been making payments on this indebtedness with some regularity and has reduced the debt from almost $56,000,000 in 1947 to its present level. It is obvious that the fact of the indebtedness militates against abandonment rather than in favor of it since the sharp reduction in Appellant's profits which would follow would interfere with, if not eliminate, Appellant's ability to continue the payments.

III.

THE PUBLIC NEED FOR THE SERVICE

The test prescribed in Section 1(18) in issuing certificates authorizing abandonment is that of determining the "present or future public convenience and necessity". Such a broad generalization gives considerable latitude to the Interstate Commerce Commission to exercise judgment and discretion based upon its administrative expertise. The

Commission must not only consider past experience and present need for the service, it must engage in admitted speculation as to what the future may hold as to a particular area with respect to commercial and industrial trends, population changes, etc. In determining the issue of public convenience and necessity for certificate purposes, it has been held that the Commission acts *administratively* (not judicially or legislatively) (*Lang Transportation Corp. v. United States*, 75 F.Supp. 915, 926-928 (1948)). The wide range of discretionary authority vested in the Commission when it acts administratively was clearly described by this Court in *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236 90 L.ed. 38 (1943) as follows at page 241:

> ". . . The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of the function the Commission has been entrusted with a wide range of discretionary authority. Interstate Commerce Commission v. Parker, 326 U.S. 60, 89 L.ed 2051, 65 S.Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See Chesapeake & O. R. Co. v. United States, 283 U.S. 35, 42, 75 L.ed. 824, 829, 51 S.Ct. 337; Alton R. Co. v. United States, 315 U.S. 15, 23, 86 L.ed. 586, 595, 62 S.Ct. 432."

The record here is voluminous. There were ten days of hearing before the Commission, 65 exhibits, most of them

statistical or technical in nature, were received and numerous witnesses testified. As might be expected in a proceeding of this nature, much of the evidence was conflicting. Appellant's principal argument in the Jurisdictional Statement appears to be its claim that the area in question lacks industrial potential and does not present an attractive picture for future rail operations. There was considerable conflicting evidence on this issue. The recommended report of the examiner (Appendix C to Jurisdictional Statement, at p. 31a) makes detailed findings from the conflicting evidence which support his conclusion that the potential of the area justifies restoration of the service. The decision of the Commission adopts the findings of the recommended report (320 ICC 19 at p. 20) and concludes itself that transportation in the area is not undergoing an immediate decline (320 ICC 19 at p. 23). As stated by this Court in *United States v. Detroit & Cleveland Navigation Co., (supra)*, at page 240, a determination of "present or future public convenience and necessity . . . entails a prophecy, so far as future requirements are concerned." It is evident from the facts of this proceeding that the Interstate Commerce Commission in great measure based its refusal to grant the certificate to abandon upon its expert estimate and appraisal of the future need of the shipping public for rail service in southern Marin County. The Appellant now asks this Court to sift the evidence and substitute its own prophecy for the future.

Appellant's argument that the decision of the Interstate Commerce Commission will require it to expend money to restore and operate a route for the benefit of another railroad, the Santa Fe, is obviously inappropriate. There is no question but what the Santa Fe will benefit from restoration of the tunnel, but it will not gain a new advantage

at the expense of the Southern Pacific. Rather, it will have restored to it the traffic which it has benefited from over the years. It is the Southern Pacific which now attempts to make capital of an act of juvenile vandalism by utilizing it as justification for an abandonment which otherwise has no basis.

IV.

THE CONSTITUTIONAL FACT DOCTRINE IS NOT APPLICABLE IN THIS PROCEEDING

Appellant attempts to invoke what it terms the "constitutional fact" doctrine which would require this Court to exercise its independent judicial judgment as to both the law and the facts on the basis that the decision complained of is confiscatory. This, of course, is the familiar *Ben Avon* doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 64 L.ed. 909 (1920) which is the only case Appellant cites. The first answer to this contention is that supplied by the opinion of the three judge district court appealed from here (228 F.Supp. 690 at 693) wherein it is noted that in rate review cases a rate is confiscatory only if it results in an overall loss of net profits to the petitioning railroad. In other words, a rate may render a particular service unprofitable, but as long as the entire system realizes a profit there is no confiscation. (*E. & O. R. Co. v. United States*, 345 U.S. 146, 148; 97 L.ed. 912 (1953).) After reference to language in the recent case of *Southern Railway v. North Carolina*, 376 U.S. 93, 11 L.ed. 2d 541 (1964), the Court concluded that the same standard could be applied in abandonment cases and that no confiscation could result from an order of the Interstate Commerce Commission denying an abandonment as long as there is no net loss to the overall system. In the instant proceeding, as indicated

above, there was no system loss whether Appellant was considered as an independent entity or as a part of the Southern Pacific system, *nor was there any loss on the particular service sought to be abandoned.*

The *Ben Avon* doctrine is not applicable for other reasons. The case was concerned with an order by the Public Service Commission of Pennsylvania establishing water rates for the future, which action the decision took care to note was legislative in nature. The decision did conclude that in such cases the reviewing tribunal must exercise its independent judgment as to both the law and the facts, but in so holding it was a clear departure from previous law. (Davis—Adm. Law Treatise, Vol. 4, p. 164.). More significant is the line of cases which came after the *Ben Avon* case. In *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38; 80 L.ed. 1033 (1936) this Court seriously qualified the *Ben Avon* rule. While yet seeming to adhere to the "independent judgment" premise, it was made clear that such judgment was none the less independent even though it relied in some measure upon the prior administrative judgment. An authoritative view was that the qualification had the practical effect of restoring the prior test of substantial evidence. (Davis—Adm. Law Treatise, Vol. 4, p. 155.)

In *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573; 84 L.ed. 1368 (1940) (Opinion amended 311 U.S. 614; 311 U.S. 570 (1941)), and in *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575; 86 L.ed. 1037 (1942) the concept of independent judicial judgment appears to have given way and the substantial evidence test restored. By 1951 this Court was able to state as follows in *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341; 95 L.ed. 1002 (1951) at page 348:

> ". . . when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to

relitigate factual questions on the ground that constitutional rights are involved." (citing cases.)

On the facts, the *Alabama* case appears to be most pertinent to this proceeding since the Alabama Commission had found an existing public need for a particular rail service despite a financial loss in providing same, which caused the railroad to complain of a confiscation of its property in violation of the due process clause of the Fourteeth Amendment. It is submitted that as to matters which have been entrusted to an expert administrative agency such as the Interstate Commerce Commission for initial determination, the substantial evidence rule now applies and the *Ben Avon* doctrine is discredited.

V.

CONCLUSION

Because of the basic flaw explained above Appellant found itself in the most incongruous position of attempting to abandon a profitable operation. The only discernible benefit in the entire proposal was that which flowed through to Appellant's parent, the Southern Pacific. Nothing would be gained in the public interest by the abandonment since there is no burden upon interstate commerce to be eased or eliminated. The shipping public on the other hand would be damaged by the loss of good and frequent rail service which has been profitable to the participating carriers. The California Commission has had long experience in regulating rail carriers in California. We have followed this proceeding closely, participated actively from its inception, and must conclude that the entire proposal is nothing more than

a thinly disguised attempt to divert traffic from a competitor while purporting to act in the public interest. The opinion of the District Court should be affirmed.

Respectfully submitted,

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Dated: San Francisco, California
September 11, 1964.

(Appendix Follows)